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Are compliance violation ‘smoking guns’ hiding in the board minutes?

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History has recorded many cases of emails or other written documents that have caused the collapse of organizations big and small. These often unstructured, informal communications help prove cases by showing what board members knew or didn’t know, and when. While Enron provided an example, it’s not only large corporations that have smoking guns hiding^[1]—every company and organization likely has something hidden away that may surface sooner or later. But with statutory enactments like the Sarbanes–Oxley Act of 2002,^[2] the U.S. Federal Sentencing Guidelines provisions related to compliance,^[3] and the widely discussed Department of Justice *Evaluation of Corporate Compliance Programs*,^[4] virtually no organization can claim to be unaware of the detailed records that must be maintained for compliance purposes. Hidden records can help tell compliance stories, including some that may end with violations, reputation damage, shareholder discontent, or more.

Beyond smoking gun emails, memos, apps, and other corporate documents or database records, there are board meeting minutes. As fundamental corporate records, meeting minutes may not be getting enough attention. For example, shareholder derivative cases highlight the importance of using board minutes to substantiate allegations. Written words recording board discussions and actions may show whether fiduciary duties were fulfilled—or not.

Board minutes’ many uses

The *Caremark* case sets forth an important standard concerning compliance oversight by which boards continue to be judged.^[5] The review of board decision-making and knowledge is centered around whether boards sufficiently supervise and monitor organizational operations. Well-designed and efficient compliance functions identify and escalate yellow and red flags for issues needing direct involvement, knowledge, or timely attention by boards. Assurances of reliable systems should indicate that essential information related to risk and compliance matters will escalate in a timely matter for review and consideration.

Documentation—including board agendas and minutes—is a substantial and essential part of compliance in demonstrating whether programs are effective. Minutes, and contents therein, have been produced by shareholders in derivative suits after book and record inspection requests. As legal records of organizational discussions and actions, they may also grab government attention in addition to judicial review. Minutes are also great tools for uncovering information—or the lack thereof—by judges and other governmental agencies.

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